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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-6219

SIGNA NELSON, Appellant,

v.

STATE ACCIDENT INSURANCE FUND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF OREGON

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

SIGNA NELSON, Appellant,

v.

STATE ACCIDENT INSURANCE FUND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF OREGON

JURISDICTIONAL STATEMENT

Appellant, Signa Nelson, appeals from the final judgment of the Court of Appeals of the State of Oregon, dated December 18, 1979, holding that ORS 656.319(1) is not violative of Fourteenth Amendment Due Process as applied to Appellant's facts.

OPINIONS BELOW

The opinion of the Oregon Court of Appeals is reported at 43 Or App 155, 602 P2d 341 (1979), and is attached in the appendix hereto, p. 1a, infra. That opinion reversed an unreported Order of the Workers' Compensation Board of the State

of Oregon (attached in the appendix at p. 9a, infra) which had affirmed de novo an unreported Opinion and Order of a Workers' Compensation Referee (attached in the appendix at p. 13a, infra).

JURISDICTION

This is an appeal under 28 USC 1257(a) from a state court decision holding that a state statute, as applied, is not violative of due process. The opinion of the Oregon Court of Appeals was entered on November 5, 1979. See p. 1a, infra. A timely Petition for Review was filed in the Oregon Supreme Court.[1] On November 29, 1979 the Oregon Court of Appeals declined to rehear the case. See p. 19a, infra. On December 11, 1979 the Oregon Supreme Court denied the Petition For Review. See p. 20a, infra. On December 18, 1979, the Oregon Court of Appeals entered its judgment and mandate. See p. 21a, infra. On December 21, 1979 Appellant filed a timely Petition for Reconsideration in the Oregon Supreme Court and a motion to recall the judgment of the Court of Appeals. On January 4, 1980 the Oregon Supreme Court requested Appellee to respond to the same. See p. 22a, infra. Appellee responded on January 16, 1980, and on January 30, 1980 the Oregon Supreme Court denied Appellant's Petition to Reconsider, and rendered moot the motion to recall the judgment of the Court of Appeals. See p. 23a, infra.

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1. The Petition for Review operated both as a Petition for Rehearing in the Court of Appeals and as a request for discretionary review by the Oregon Supreme Court. See Rules of Appellate Procedure, Supreme Court and Court of Appeals of the State of Oregon, Rules 10.05, 10.10, and 10.15. See p. 16a, infra.

Notice of Appeal was filed in the Oregon Court of Appeals on February 28, 1980. This Court has jurisdiction under 28 USC 1257(2). See Cohen v. California, 403 US 15 (1971), reh den 404 US 876; Madruga v. Superior Court, 346 US 556 (1953); Rescue Army v. Municipal Court, 331 US 549 (1947); and Bandini Petroleum Co. v. Superior Court, 284 US 8 (1931).

QUESTION PRESENTED

Oregon's worker's compensation scheme requires an injured worker to file a notice of injury with his employer within a specified time of the injury. The employer or its insurance carrier may thereafter deny liability for all or part of the claim by giving written notice of its denial to the worker. If notice of denial is given, ORS 656.319(1) renders the worker's claim unenforceable unless the worker, within a specified time period, files a request for a hearing with the Workers' Compensation Board of Oregon.

The question presented here is whether the literal application of ORS 656.319(1) renders it violative of the Fourteenth Amendment Due Process clause when a claimant is mentally incompetent due in substantial part to an on-the-job injury, the compensation carrier has actual knowledge of both the mental incapacity and the job relatedness of the incapacity, and the compensation carrier nonetheless denies that the incapacity was job related and mails notice of that denial to the claimant with knowledge of claimant's inability to understand the notice or to protect her rights.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, United States Constitution:

". . .nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

ORS 656.319(1):

"(1) With respect to objection by a claimant to denial of a claim for compensation under ORS 656.262, a hearing thereon shall not be granted and the claim shall not be enforceable unless:

"(a) A request for hearing is filed not later than the 60th day after the claimant was notified of the denial; or

"(b) The request is filed not later than the 180th day after notification of denial and the claimant establishes at a hearing that there was good cause for failure to file the request by the 60th day after notification of denial."

STATEMENT OF THE CASE

Facts

Appellee is an agency created by state statute to insure employers against any liability they may have on account of an on-the-job injury of their employees, to receive and process the claims of workers, and to operate physical rehabilitation centers for injured workers. ORS 656.752. Appellee is the largest insurer covering Oregon workers' compensation claims. An injured worker has 30 days within which to notify his employer of an on-the-job injury. ORS 656.265. The employer then has five days within which to notify Appellee of the claim. ORS 656.262. Appellee provides the compensation to the worker promptly upon receipt of a notice of a claim, except where Appellee denies the right to compensation. Id.

All attending physicians must promptly send medical reports to Appellee. ORS 656.252.

Signa Nelson suffered an industrial accident to her back on December 31, 1972. She was immediately hospitalized. She duly filed her notice of injury under ORS 656.265, which claim was accepted.

On February 23, 1973 an attending physician reported that she "appears very depressed," had a low back strain, and that "there is rather marked psychogenic overlay to this problem with chronic depression." He recommended that Appellant be referred for "psychiatric evaluation."

On March 16, 1973 the Medical Director of the Workers' Compensation Board of Oregon (hereafter, WCB) reported that Ms. Nelson was not physically fit to participate in a rehabilitation program.

On March 27, 1973 Ms. Nelson was given a comprehensive physical examination by another attending physician, who concluded that she "is obviously depressed" and recommended that she have a psychological evaluation.

On April 5, 1973 Ms. Nelson was examined by three more physicians. They reported that "on examination she is an obviously depressed and tearful woman. . .". They diagnosed her condition, inter alia, as "depression, moderately severe," and recommended that she be given psychiatric treatment for her depression.

On April 6, 1973, a clinical psychologist examined Ms. Nelson and reported that "[t]he patient's comments indicated that she is overwhelmed at the present time and not [sic] knowing how to deal with her situation." Further:

> "The diagnostic impression is that of depressive neurosis, severe degree, in one feeling overwhelmed and depressed relating to pain, financial worries, upset relating to a previous divorce, lack of hope regarding the future, excessive preoccupation with physical symptoms, loneliness, negative self-feelings, and poor relationships. . . .There have been and are massive emotional problems, with added stress at this time, the patient could move into psychotic depression."

The psychologist concluded that the "psychopathology (depression) is a result of the injury" and that Ms. Nelson was "currently unemployable due to emotional disturbance."

On April 11, 1973 another specialist reported that "[h]er back problems and psychiatric problems are probably closely connected and will be the most difficult thing to help her with."

On April 25, 1973, at the recommendation of a psychiatrist, Ms. Nelson was voluntarily committed to the Oregon State Hospital for treatment as a mentally ill person.[1] She was diagnosed on admission as suffering from involutional melancholia. She remained there until September 11, 1973.

On May 24, 1973 the State Accident Insurance Fund (Appellee), notwithstanding prior actual receipt of all the above medical reports and notwithstanding constructive knowledge of Ms. Nelson's whereabouts,[2] sent a letter to Ms. Nelson's home address stating that the physical injury to her back was compensable but denying that her depression was related to the physical injury.

1. The Oregon State Hospital is an agency of the State of Oregon. ORS 179.321.

2. The State Accident Insurance Fund is an agency of the State of Oregon, ORS 656.752, and is the largest insurance carrier for employers subject to Oregon's Workers' Compensation law. As a state agency, it had constructive knowledge that Ms. Nelson was in the Oregon State Hospital.

In June, 1973 Ms. Nelson received electroshock therapy for her depression. At some point in time while Ms. Nelson was in the state mental institution her daughter brought her several pieces of mail, possibly including Appellee's letter denying liability for her emotional injuries. Ms. Nelson does not remember receiving or seeing the letter at all, and her daughter did not know what rights her mother had with respect to the letter.

Ms. Nelson, under ORS 656.319(1), had until July 24, 1973, or, at the most, until November 24, 1973 within which to request a hearing with respect to Appellee's May 24, 1973 denial notice. No such request was made until 1974, after Ms. Nelson contacted a lawyer. At the hearing, a psychiatrist, who described the effects of electroshock therapy, stated without contradiction that Ms. Nelson was not legally competent to handle her affairs until January of 1974, and that even if she had had some awareness in May, June, or July of 1973 of receiving Appellee's denial letter she did not then have the ability to understand it nor the competency to deal with it.

How The Federal Issue Was Raised

At the subsequent hearing prescribed by statute Appellee took the position that the Workers' Compensation Referee had no jurisdiction over Ms. Nelson's claim for emotional injury because ORS 656.319(1) made that claim unenforceable. Ms. Nelson filed a memorandum with the Referee in which she asserted that "proper notice is a fundamental in which she asserted that "proper notice is a fundamental aspect of affording due process," citing Schroeder v. City of New York, 371 US 208 (1962) and Morrisey v. Brewer, 408

US 481 (1971). Ms. Nelson also argued that Appellee's notice of denial "was not calculated 'under all the circumstances' to afford claimant an opportunity to object to it."

The Referee found as a fact that Ms. Nelson:

> ". . .did not have the competency to understand the denial to timely request a hearing when she received it while in the state mental hospital and that. . .she did not have the emotional and mental level to request a hearing on the issue thereafter until it was done on her behalf by counsel."

The Referee set aside Appellee's denial and ordered compensation for Ms. Nelson's emotional injury. The WCB affirmed the Referee on de novo review, and Appellee sought review by the Oregon Court of Appeals, arguing that ORS 656.319(1) barred Ms. Nelson's claim.

Ms. Nelson's brief in the Court of Appeals repeated her due process arguments. That court, however, reversed the WCB, holding that ORS 656.319(1) made her claim unenforceable. In her Petition for Review, Ms. Nelson posed the issue as: "The Court of Appeals erred in holding that service by ordinary mail to the home of an incompetent person is sufficient. . ." She argued that "the Court of Appeals ignored. . .fundamental due process requirements," that "the carrier knew from its medical records that claimant's emotional condition was compensable and yet issued a denial letter to her home at a time when it knew the claimant was in a state hospital. . .", and that "because of the lack of due process in serving the denial letter on the claimant, it is as though no service was ever made." In her Petition for Reconsideration, Ms. Nelson argued that:

"The Court of Appeals erred in holding that claimant's mental incapacity did not excuse her non-compliance with ORS 656.319(1). To so hold is repugnant to the due process clause of Amendment Fourteen of the Constitution of the United States, which requires effective notice and an opportunity to be heard."

The claim of Ms. Nelson that ORS 656.319(1) was unconstitutional as applied to her was thus rejected sub silentio by the Oregon Court of Appeals. The Oregon Supreme Court, although requiring Appellee to respond to the contention, ultimately declined review.

THE QUESTION IS SUBSTANTIAL

It is a hornbook axiom that legal rights, without procedural due process are largely meaningless. That is why this Court so frequently deals with the question of what process is due. Cf., Robinson v. Hanrahan, 409 US 38 (1972).

There is no question that statutory entitlements have the full protection of the Due Process Clause, and that a state and its agencies no longer can hide behind the old "privilege-not-a-right" argument. Goldberg v. Kelly, 397 US 254 (welfare benefits); Sherbert v. Verner, 374 US 398 (1963) (unemployment benefits); Speiser v. Randall, 357 US 513 (1958) (tax exemption).

In Robinson v. Hanrahan, supra, this Court ruled that notice sent to a party's home address when it was known that the party was incarcerated did not comply with due process. In Covey v. Town of Somers, 351 US 141 (1956) this Court held that notice sent to a known mental incompetent did not comply with due process.

In Ms. Nelson's case, Appellee did both. It sent a denial letter to her home when it had notice[1] that she was elsewhere; and it sent notice to Ms. Nelson with actual knowledge of her severe mental depression and incapacity to handle her affairs. Further, Appellee's notice denied liability in the face of uncontradicted medical reports that Ms. Nelson's emotional disturbance was related to her on-the-job injury. Such a clear case of overreaching and sharp practice by a state agency cries out for justice.

Governmental overreaching with respect to notice is a reoccurring problem. In Walker v. Hutchingson City, 352 US 112 (1956), city officials gave notice of condemnation proceedings by publication, although the defendant's address was easily obtainable. In holding notice by publication violative of due process under those circumstances, this Court said:

"The right to a hearing is meaningless without notice." 352 US at 115

And:

"There is nothing peculiar about litigation between the Government and its citizens that should deprive those citizens of a right to be heard. . . . In too many instances notice by publication is no notice at all. It may leave Governmental authorities free to fix one-sidedly the amount that must be paid owners for their property taken for public use." 352 US at 117. (emphasis added)

Robinson v. Hanrahan, supra, also involved governmental overreaching in utilizing a form of notice that government officials knew or should have known would be

1. The State of Oregon, through Appellee, sent the notice to Ms. Nelson's home when the State of Oregon, through its agent, the Oregon State Hospital, had actual knowledge that Ms. Nelson was institutionalized.

ineffective. A California court, in People v. One 1941 Chrysler 6 Tour Sedan, 81 Cal App 2d 18, 183 P2d 368 (1947), addressed a similar overreaching problem and held that when a statute provides for various forms of alternative service of notice, due process prevents a complainant from selecting an alternative form of service that he knows or should know will not notify the other party when he also knows or should know that one of the other alternatives, if selected, would in fact notify the adverse party. 183 P2d at 378.

Mullane v. Central Hanover Bank and Trust, 339 US 306 (1950), teaches that "[w]hen notice is a person's due, process which is a mere gesture is not due process." 339 US at 315. It is important for the Mullane, Covey, Walker, and Robinson principles to be synthesized into a due process principle to protect the hundreds of thousands of persons in this country who apply for or receive worker's compensation benefits, welfare benefits; social security benefits, statutory disability benefits, and other statutory entitlements. A substantial proportion of these beneficiaries have severe mental and physical handicaps. When a governmental agency knows of such handicaps, it cannot be allowed to take advantage of the handicap by providing notice, affecting rights, which it knows or should know will be ineffectual.

CONCLUSION

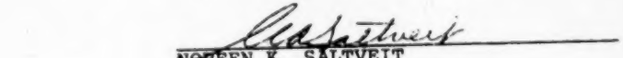
For the above reasons, this Court should note probable jurisdiction of this appeal. If the Court concludes

that appeal is not available, then Appellant requests the Court, pursuant to 28 USC 2103, to treat her appeal papers as a petition for writ of certiorari and to grant certiorari accordingly.

DATED: March 7, 1980

Respectfully submitted,

MERTEN & SALTVEIT



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IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of

Signa Nelson, Claimant,

WCB No. 77-1153
CA 14676

Respondent,

v.

State Accident Insurance Fund,

Petitioner.

****

Judicial Review from Workers' Compensation Board.

Argued and submitted September 19, 1979.

Darrell E. Bewley, Associate Counsel, State Accident Insurance Fund, Salem, argued the cause for petitioner. With him on the brief were K. R. Maloney, Chief Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund, Salem.

Noreen K. Saltveit, Portland, argued the cause respondent. With her on the brief was Merten & Saltveit, Portland.

Before Schwab, Chief Judge, and Tanzer and Campbell, Judges.

CAMPBELL, J.

Reversed.

FILED: November 5, 1979

CAMPBELL, J.

The State Accident Insurance Fund (SAIF) appeals from a Workers' Compensation Board (Board) order affirming the referee's order setting aside SAIF's May 24, 1973, denial of responsibility for claimant's psychological problems. The issue presented is whether claimant's mental incapacity at the time of the denial excuses her failure to request a hearing on the denial within the time limits established by ORS 656.319(1). We hold that such compliance is not excused and reverse.

In December 1972, claimant received a compensable back injury. As a result of this injury, she became severely depressed and entered Oregon State Hospital on April 25, 1973. Her condition was diagnosed as involutional melancholia. During her hospital stay, claimant received electroshock therapy, which her doctors assessed as moderately successful. She was discharged September 11, 1973.

SAIF issued the letter denying liability for claimant's psychological condition May 24, 1973, while claimant was at the State Hospital. The letter, sent by ordinary mail to claimant's home, was taken to claimant by her daughter. Claimant did not request a hearing on the denial.

Subsequent to a July 30, 1973, determination order awarding claimant 16 degrees or five percent unscheduled low back disability, claimant's claim was reopened in May 1974. A second determination order was issued October 23, 1974, awarding claimant an additional 64 degrees or 20 percent unscheduled low back disability. The second determination order stated, "This is not a Board Determination of any conditions denied by the insurer in his letter dated May 24, 1973." Claimant requested a hearing on November 19, 1974. By stipulation of April 29, 1975, her claim was reopened for payment of time loss and further medical care and treatment, and the request for a hearing was dismissed. A third determination order dated July 21, 1975, awarded claimant additional temporary total disability as per the stipulation, but awarded no additional permanent partial disability. Her claim was again reopened by stipulation for further medical care and treatment and time loss commencing January 1, 1976. On February 1, 1977, a fourth determination order awarded claimant additional temporary total disability as per the stipulation and an additional 32 degrees or 10 percent unscheduled low back disability. On February 7, 1977, claimant requested a hearing on the determination order. A hearing was held June 10, 1977. Prior to this hearing,

Appendix 3a

all proceedings since the May 24, 1973, denial had related solely to claimant's physical disability. At the hearing, claimant for the first time expressly raised the issue of her competency at the time of her receipt of the May 24, 1973, denial letter. The referee ordered the hearing continued until claimant submitted evidence on that issue. On October 25, 1977, claimant requested a hearing, which was to constitute a continuance of the earlier hearing.

A hearing was held January 25, 1978, at which claimant submitted, inter alia, a report dated August 11, 1977, from S. Roy Moss, M.D., a psychiatrist. Dr. Moss had previously examined claimant on May 20 and August 9, 1977, and had read reports from claimant's treatment at Oregon State Hospital and later treatment at Dammasch State Hospital. In the report, after setting forth claimant's history, Dr. Moss stated his opinion that due to "organic brain syndrome from electroshock therapy and her basic continued emotional problems," claimant did not understand the meaning of the May 24, 1973, denial or that she could appeal the decision. Dr. Moss testified that by January 1974, claimant was probably competent from a rational standpoint to enter a contract. SAIF introduced no evidence to controvert these conclusions. The referee found that when claimant received the denial she lacked the mental

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competency to understand it and to request a hearing in a timely fashion. For that reason, he set aside the May 24, 1973, denial. On review, the Board affirmed.

ORS 656.319(1) sets the time within which a claimant must request a hearing on a denial of a claim. That section provides:

> "(1) With respect to objection by a claimant to denial of a claim for compensation under ORS 656.262, a hearing thereon shall not be granted and the claim shall not be enforceable unless:
>
> "(a) A request for hearing is filed not later than the 60th day after the claimant was notified of the denial; or
>
> "(b) The request is filed not later than the 180th day after notification of denial and the claimant establishes at a hearing that there was good cause for failure to file the request by the 60th day after notification of denial."

It is undisputed that claimant did not request a hearing on the denial within the time required.

The benefits awarded under the workers' compensation law are purely statutory, and a claimant must strictly follow the prescribed procedures in order to recover under the law. Gerber v. State Ind. Acc. Com., 164 Or 353, 101 P2d 416 (1940). Time limitations prescribed by the law are limitations upon the right to obtain compensation and are not subject to exceptions contained within the general statute of limitations. Lough v. State

Industrial Acc. Com., 104 Or 313, 207 P2d 354 (1922). Neither the Board nor the courts may waive these requirements. Johnson v. Compensation Department, 246 Or 449, 425 P2d 496 (1967); Rosell v. State Ind. Acc. Com., 164 Or 173, 95 P2d 726 (1940).

Lough v. State Industrial Acc. Com., supra, is persuasive on the issue before us. In Lough, claimant became mentally incapacitated as a result of an industrial injury and was unable to file a claim within the time required by statute. The court held his claim was barred, stating:

> "Without making any exception in favor of the insane, the disabled or the infant, the legislature has seen fit to prescribe the terms upon which the bounty of the state may be enjoyed. Those who would avail themselves of the privilege thus extended must comply with its terms, and it does not lie within the power of any judicial tribunal, however beneficial it may be, to add terms that have not been put there by the law-making power. We may well regard this case as one of great misfortune, and yet we are powerless to extend relief where none is awarded by the statute." 104 Or at 322.

Although the legislature is aware of the problem of the mentally incapacitated claimant,[1] it has made no provision for an exception to ORS 656.319(1) in favor of such claimants. We hold that claimant's mental incapacity at the time of the denial did not excuse her compliance with ORS 656.319(1).

Claimant argues that since she made a timely request for a hearing on the second determination order, and that order "made reference to" the May 24, 1973, denial, she is not barred from raising the issue of the compensability of her psychological problems. We disagree. As noted above, the second determination order stated, "This is not a Board Determination of any conditions denied by the insurer in his letter dated May 24, 1973." An appeal from this determination order could not, therefore, raise the issue of the denial.

Reversed.

FOOTNOTE

1

See former ORS 656.319(1)(d), repealed by Oregon Laws 1975, ch 497, § 4. Under that section, in circumstances not present here, a worker rendered mentally incapable of seeking compensation because of an industrial injury was granted an extension of time in which to request a hearing on certain questions related to compensation.

BEFORE THE WORKERS' COMPENSATION BOARD OF

THE STATE OF OREGON

In the Matter of the Compensation of SIGNA NELSON, Claimant [Request for Review by the SAIF]	WCB Case No. 77-1153 SAIF Claim No. DC 434390 ORDER ON REVIEW

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks review by the Board of the Referee's order setting aside its denial dated May 24, 1974 of claimant's psychological problems and remanding the claim to the Fund for acceptance and payment of compensation, as provided by law.

At the hearing before the Referee, four issues were presented: (1) extent of disability; (2) propriety of the Fund's denial of responsibility for claimant's psychological problems; (3) propriety of the Fund's refusal to reopen the claim as of March 10, 1977; and (4) whether or not claimant was presently orthopedically and psychologically stationary.

Claimant had suffered a compensable injury to her back in December 1972 and was receiving compensation for that injury at the time she was admitted to the Oregon State Hospital as a patient on April 25, 1973. Claimant remained as a patient there until September 11, 1973 when she was discharged and considered improved, competent, and able to drive a motor vehicle. Claimant's illness was diagnosed as involutional melancholia, in remission. She had been tried on various psychotrophic medications since her admission, but when she failed to respond she was given a course in electroconvulsive therapy in June 1973 to alleviate the depression; this was only moderately successful.

Upon claimant's discharge, it was recommended that she contact the Multnomah County Mental Health Clinic for a follow-up and further prescriptions. The prognosis was fair if in the near future she could get a meaningful full time job, but the doctor indicated that if this did not happen it was quite possible claimant would become depressed again and might require rehospitalization.

Claimant's claim was first closed by a Determination Order in July 1973 which awarded her 16° for 5% permanent partial disability. On December 27, 1973 the claim was reopened for treatment and on February 15, 1974 a laminectomy was performed at L4-5.

Claimant was referred to the Pain Clinic in Portland on June 5, 1974 and her claim was subsequently closed by a Second Determination Order dated June 23, 1974 which awarded claimant additional compensation for 20% permanent partial disability but nothing for the psychological problems which had been denied on May 24, 1973.

Claimant requested a hearing on November 19, 1974 and raised all of the issues referred to previously. Pursuant to a stipulation, dated April 29, 1975, the claim was reopened. A Third Determination Order, dated July 21, 1975, awarded claimant no additional compensation for permanent partial disability. Again a request for hearing was made and again the claim was reopened for further treatment prior to the hearing. The claim was then closed by a Fourth Determination Order, dated February 1, 1977, which awarded claimant additional compensation for temporary total disability and additional 32° for 10% permanent partial disability.

On February 7, 1977 another request for hearing was made and on June 10, 1977 all parties were present for that hearing which was actually treated as a conference and the issue of the competency of claimant at the time she received the letter denying responsibility for her psychological problems was delineated. On August 15, 1977 there was a request for reopening and another request for hearing.

The Fund's position was that the Referee had no jurisdiction to entertain the motion to set aside the denial because at some time the denial was brought to her attorney and she thereafter became competent so that she was now bound thereby.

Dr. Moss, a psychiatrist, testified that claimant's industrial trauma when she fell down some stairs was a significant triggering effect in precipitating claimant's depression and that she had never re-established herself to the psychological state which she had been prior to the industrial injury.

Dr. Moss interviewed claimant to determine if she understood the denial made by the Fund. He read the hospital records relating to the electrical shock treatment to establish the proximity of time to the date she received the denial letter and he also checked her memory and comprehension at that time. He felt she had some knowledge of the denial matter but that her memory changed from day to day and she could not keep it in focus.

It was Dr. Moss' opinion that claimant's memory confusion probably cleared somewhat after September, however, it was not a complete recovery. Claimant told Dr. Moss she continued to have back problems which affected her emotionally and from 1973 to 1976 she had been receiving out-patient mental clinic care. Dr. Moss, who had previously worked at the Oregon State Hospital, said it was standard procedure no matter what condition the patient was in to report that he or she was considered improved, competent, and able to drive a motor vehicle at the time said patient was discharged.

The Referee found that claimant did not have the competency to understand the letter of denial to the extent that she would have been able to make a timely request for hearing when she received the letter while a patient in the Oregon State Hospital. Although several months later she was able to perform day to day tasks, she still did not have the emotional and mental level to request a hearing on the issue until it was actually done on her behalf by an attorney. He found that all the medical evidence indicated that claimant still has not returned to her pre-accident mental status and that she has had on-going mental problems and has a serious problem even at the present time. He set aside the denial by the Fund for responsibility for claimant's psychological problems dated May 24, 1973. This rendered moot all of the other issues.

The Board, on de novo review, finds that Dr. Moss' testimony is sufficient to establish that claimant's psychological problems were related to her industrial injury in December 1972 and, therefore, the denial of responsibility therefor by the Fund was improper. The Board agrees with the Referee that claimant was not mentally competent at the time she received the Fund's denial dated May 24, 1973 to fully realize what was required to make a timely request for hearing on said denial. The Referee properly set aside the denial and by doing so rendered moot all of the other issues presented at the hearing.

ORDER

The order of the Referee, dated June 21, 1978, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum of $350, payable by the State Accident Insurance Fund.

NOTICE TO ALL PARTIES: This order is final unless within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

Entered at Salem, Oregon and copies mailed to:

Signa Nelson, 1509 Jackson St., Oregon City, OR 97045
Merten & Saltveit, Attorneys, 117 SW Taylor St., Portland, OR 97204
City Center Motel, 250 First Ave., Seaside, OR 97128
State Accident Insurance Fund, Claims Div., Salem, OR 97312
SAIF, Legal Services, 400 SE High, Salem, OR 97312

on this 15th day of May, 1979

WORKERS' COMPENSATION BOARD

M. Keith Wilson, Chairman

Approved as to form:

John R. McCullough
Appeals Counsel

Kenneth V. Phillips, Board Member

BEFORE THE WORKERS' COMPENSATION BOARD

STATE OF OREGON

HEARINGS DIVISION

In the Matter of the Compensation of SIGNA NELSON, Claimant	)	WCB Case No. 77-1153 SAIF Claim No. DC 434390 OPINION AND ORDER

This matter came on regularly for hearing the 25th day January, 1978, in Portland, before Joseph D. St. Martin, Administrative Law Judge. Claimant was present and represented by Peter Davis and the State Accident Insurance Fund appeared by and through Ken Kleinsmith. The case was continued for closing arguments and claimant's brief was received March 31, 1978. SAIF's counsel telephoned the undersigned that SAIF would not submit a closing argument, but the telephone message was inadvertently mislaid, and the case was closed April 26, 1978 upon request of claimant's counsel.

The prime issue is whether SAIF's denial of May 24, 1973 should be set aside. The denial was for responsibility for psychological problems and was sent to her last known home address. During the interim, claimant was admitted on April 25, 1973 to the Oregon State Hospital where she was a patient until September 11, 1973. She was discharged as considered improved, competent and able to drive a motor vehicle. The diagnosis was involutional melancholia, in remission. She was receiving compensation from her December, 1972 industrial accident to her back while she was in the hospital. Claimant was tried on various psychotrophic medications since April, 1973, but when she failed to respond she was given a course of electroconvulsive therapy in June, 1973 to alleviate ths depression which was only moderately successful. She continued to be on an anti-depressant medication and on discharge it was recommended that she contact the Multnomah County Mental Health Clinic for follow-up and further prescriptions. Prognosis was fair if in the near future she could get a meaningful full-time job. The doctor indicated that if this did not happen there was a good chance that claimant would become depressed again and might need to be rehospitalized. Prognosis from that standpoint remained somewhat guarded. The doctor's prognosis was very acurate because she has had to be rehospitalized.

In July of 1973, a First Determination Order was issued awarding 5% permanent partial disability. On December 27, 1973, the claim was re-opened for treatment and on February 15, 1974 a laminectomy was performed at L4-5. On June 5, 1974, she was referred to the Portland Pain Clinic. A Second Determination Order of June 23, 1974 awarded claimant an additional 20% permanent partial disability and nothing for the denied condition. Claimant first requested a hearing on November 19, 1974, raising all issues. On April 29, 1975, a Stipulation was entered into re-opening her claim and on July 21, 1975 a Third Determination Order was issued awarding no additional permanent partial disability. There was a request for hearing and then on January 1, 1976 the claim was again re-opened for further treatment. On February 1, 1977, a Fourth Determination Order awarded additional time loss and an additional 10% permanent partial disability. On February 7, 1977, there was a request for hearing and on June 10, 1977 all parties were present for a hearing that was treated as a conference and the issue of the competency of claimant when she received the denial letter for psychological problems was delineated. On August 15, 1977, there was a request for re-opening and another request for hearing.

The Fund's position is that the Administrative Law Judge has no jurisdiction to entertain the Motion to set aside the denial because at some time the denial was brought to her attorney and she thereafter became competent so that she was now bound thereby.

At the hearing, a well qualified psychiatrist, Dr. Roy Moss, testified that her industrial trauma when she fell down some stairs was the significant triggering effect in precipitating her depression and that she has never re-established herself to the psychological state she had before the industrial accident.

Dr. Moss testified that he interviewed claimant a second time to ascertain if she understood the SAIF denial. He read the hospital records of the dates of the electroshock treatment to establish the proximity of time to receiving the denial and he prepared himself for checking her memory and comprehension at that time. He thought she had some knowledge of the denial matter, but her memory changed from day to day and she could not keep it in focus. He thought that her memory confusion probably cleared in 2-3 months and that perhaps after September over a period of 2-5 months she became more clear in her mind, but it was not a complete recovery. By history she continued to have back problems which affected her emotionally and from 1973 to 1976 she had out-patient mental clinic care. She told the doctor in October of 1973 she could handle everyday things, but he thought that she was passive,

that even though she understood the matter that she would be a person most reluctant to take steps on her own. Her passivity and depression may have made her feel hopeless to pursue any denial matter. She thought the denial matter was foreclosed to her and that's why she never tried to relitigate it.

On cross-examination, Dr. Moss testified that she had a passive-dependent personality before the accident, but she compensated for it and was able to function. He stated that he used to work at the State hospital and it was standard to say no matter what state the patient was in, that he or she is now considered improved, competent and able to drive a motor vehicle. On redirect, he stated claimant was significantly impaired irrespective of money factors involved in the compensation claim.

OPINION:

I am of the opinion that claimant did not have the competency to understand the denial to timely request a hearing when she received it while in the State mental hospital and that while several months later she was able to perform day to day tasks she did not have the emotional and mental level to request a hearing on the issue thereafter until it was done on her behalf by counsel. All of the medical testimony, and there is none to the contrary, points out that she still has not returned to her pre-accident mental status and that she has had ongoing mental problems and has a serious problem even yet today. Her mental condition for this entire period of time has been very carefully reviewed by Dr. Moss and I am well satisfied with his honest, credible testimony about claimant's mental health condition. The setting aside of this denial renders the other issues moot.

ORDER:

IT IS HEREBY ORDERED that the SAIF denial of May 24, 1973 be and the same is hereby set aside; and

IT IS FURTHER ORDERED that the claim for psychological problems precipitated by the industrial accident be and the same is hereby remanded to SAIF for acceptance and payment of benefits as by law provided; and

IT IS FURTHER ORDERED that Peter Davis be and he is hereby awarded a reasonable attorney fee of $1,000 for prevailing upon a denied claim payable by SAIF.

PETITIONS FOR REVIEW AND REHEARING

Rule 10.05

SUPREME COURT REVIEW OF COURT OF APPEALS DECISION

A party seeking to challenge a decision of the Court of Appeals shall do so by filing a petition for review in the Supreme Court. The petition shall be in the form of a brief, prepared in conformity with Rule 7.05, and shall include a copy of the court's opinion. In addition, the petitioner shall designate on the cover which party is the petitioner, the date of the decision of the Court of Appeals, the author of the challenged opinion and other members of the court who concurred in or dissented from the court's decision.

The petitioner shall file 26 copies of the petition with the Administrator within 30 days after the date of the decision of the Court of Appeals. One of the copies shall show proof of service of two copies on all other parties. An adverse party need not answer unless requested by the court.

The petition shall contain in the following order:

(a) A prayer for review;

(b) A statement of the points relied on for reversal of the decision of the Court of Appeals, including appropriate authorities;

(c) A short statement of facts relevant to the appeal, but facts correctly stated in the opinion of the Court of Appeals should not be restated;

(d) A statement of concrete reasons, apart from those asserted for reversal, explaining why the issues presented have importance beyond the particular case and require decision by the Supreme Court; and

(e) A copy of the opinion of the Court of Appeals, showing the judges who concurred in or dissented from it.

See ORS 2.520. See also Appendix K.

Rule 10.10

RECONSIDERATION BY COURT OF APPEALS

The petition for review in the Supreme Court shall serve as the petition for reconsideration in the Court of Appeals.

The Court of Appeals first will determine whether it will reconsider the case. Upon making that decision the court will enter an order evidencing such determination and transmit a copy of such order to the Supreme Court and to the parties of record.

If the Court of Appeals decides to reconsider, it may do so with or without oral argument and it may issue a modified or supplemental opinion or adhere to its former decision and opinion.

The petition for review to the Supreme Court will remain in abeyance until the Court of Appeals renders its decision and order on the petition.

Any party who is dissatisfied with any modification or supplemental decision of the Court of Appeals on reconsideration may request by motion to the Supreme Court that the Supreme Court proceed to consider the petition for review of the original decision as modified or supplemented, or may file an additional petition for review. Any such motion or petition must be filed with proof of service within 30 days after the entry of the modified decision of the Court of Appeals.

The Supreme Court will dismiss the petition for review and the Court of Appeals will issue its mandate if within 30 days after any modification or supplemental decision by the Court of Appeals, a party does not file a motion requesting consideration of the existing petition for review or file a new petition for review.

If the Court of Appeals denies reconsideration, the Supreme Court will proceed to determine whether to grant review.

Rule 10.15

ACCEPTANCE OF REVIEW BY SUPREME COURT

A petition for review of a decision of the Court of Appeals shall be allowed whenever three or more judges of the Supreme Court vote to allow it. If the Supreme Court accepts review it may limit the questions on review and set the case for oral argument.

If the Supreme Court requests a response, the preparation and filing thereof shall be governed by Rules 7.05 and 7.47.

The record on review shall consist of the record before the Court of Appeals.

SUPREME COURT COURT of APPEALS

LOREN D. HICKS
State Court Administrator

Supreme Court Building
Salem, Oregon 97310

Telephone Area Code — 503

Case Records 378-6005
Legal Counsel 378-6022
Administrator 378-6046

December 3, 1979

RECEIVED
1979
Ans'd.....

Noreen K. Saltveit
Attorney at Law
117 S. W. Taylor Suite C
Portland, OR 97204

Re: Nelson v. SAIF
CA 14676 SC 26618

Dear Ms. Saltveit:

Pursuant to Rule of Procedure 10.10 the Court of Appeals has considered the Petition for Review filed in the above case and has on November 29, 1979, decided not to rehear the matter or change its decision. Therefore, the Supreme Court will proceed to determine whether to grant review. No mandate can issue until the Supreme Court has completed its review of the petition.

Yours very truly,

Carol Justis/mb

Carol Justis
Records Administrator

CJ/vr
cc: Darrell E. Bewley

SUPREME COURT COURT of APPEALS

LOREN D. HICKS
State Court Administrator

Supreme Court Building
Salem, Oregon 97310

Telephone Area Code — 503

Case Records 378-6005
Legal Counsel 378-6022
Administrator 378-6046

December 12, 1979

Noreen K. Saltveit
Attorney at Law
117 S. W. Taylor Suite C
Portland, OR 97204

Re: Nelson vs. SAIF
CA 14676 SC 26618

Dear Ms. Saltveit:

The Supreme Court on December 11, 1979, denied Respondent's Petition for Review in the above-entitled matter.

Very truly yours,

Marilyn Hartley

Marilyn Hartley
Supreme Court Calendar Clerk

MH/vr
cc: Darrell E. Bewley

RECEIVED
1979
Ans'd.....

STATE OF OREGON

COURT OF APPEALS

COPY

In the Matter of the Compensation of

SIGNA NELSON, Claimant,

Respondent,

v.

STATE ACCIDENT INSURANCE FUND,

Petitioner.

JUDGMENT AND MANDATE

ON REVIEW FROM WORKERS' COMPENSATION BOARD

No. 77-1153 CA 14676

This cause having come on to be heard on appeal and having been duly submitted and considered and the Supreme Court having denied review on December 11, 1979;

IT IS HEREBY ADJUDGED and ORDERED that the decision entered below is reversed and the cause remanded to said court for further proceedings pursuant to law and this Court's decision and opinion herein rendered November 5, 1979.

IT IS FURTHER ORDERED that petitioner recover from respondent costs and disbursements in this court in the amount of $ 100.

ISSUED at Salem, Oregon: DEC 18 1979

RECEIVED

1979

Ans'd.....

STATE OF OREGON,)
County of Marion.)

I, LOREN D. HICKS, State Court Administrator for the State of Oregon, do certify that this copy of ORDER is a correct transcript of the original, which is on file in my office.

IN TESTIMONY WHEREOF, I have affixed the seal of the Court at Salem, Oregon, this _____.

LOREN D. HICKS
State Court Administrator

by _____
Deputy Administrator

Appendix 21a

SUPREME COURT COURT of APPEALS

LOREN D. HICKS
State Court Administrator
378-6046

ADMINISTRATIVE OFFICE
SUPREME COURT BLDG.
SALEM, OREGON 97310

Telephone Area Code — 503
Re Cases on Appeal 378-6025
Legal Counsel 378-6022
Oreg. Reports Editor 378-2802

January 4, 1980

Mr. Darrell E. Bewley
Associate Counsel
SAIF Building
400 High Street, S.E.
Salem, Oregon 97312

Re: Signa Nelson v. SAIF
CA #14676; SC #26618
WCB #77-1153

Dear Mr. Bewley:

The Supreme Court desires that SAIF respond to the claimant's petition for reconsideration of the Supreme Court order denying her petition for review in the above-entitled matter. The Supreme Court is particularly interested in SAIF's response to her discussion of the relevance of Covey v. Town of Somers, 351 US 141 (1956), and Robinson v. Hanrahan, 409 US 38 (1972). SAIF's response should be served and filed on or before January 16, 1980.

Very truly yours,

David Gernant
Legal Counsel

DG:dj

cc: Ms. Noreen K. Saltveit
bc: Judge Howell

RECEIVED
JAN 1980
Ans'd.....

Appendix 22a

SUPREME COURT COURT of APPEALS

LOREN D. HICKS
State Court Administrator
378-6046

ADMINISTRATIVE OFFICE
SUPREME COURT BLDG.
SALEM, OREGON 97310

Telephone Area Code — 503
Re Cases on Appeal 378-6005
Legal Counsel 378-6022
Oreg. Reports Editor 378-2802

January 30, 1980

1/30/80

Ms. Noreen K. Saltveit
Merten & Saltveit
Attorneys at Law
Suite C, Mikado Block
117 S.W. Taylor
Portland, Oregon 97204

Re: Signa Nelson v. SAIF
CA #14676; SC #26618
WCB #77-1153

Dear Ms. Saltveit:

The Supreme Court has today denied the respondent Nelson's petition to reconsider the Supreme Court's previous order denying the petition for review. The motion to recall the judgment and mandate that you filed in the Court of Appeals was also transmitted to the Supreme Court for consideration with the petition for reconsideration. Since the petition for reconsideration has now been denied, the motion to recall the mandate will be filed without action as moot.

Very truly yours,

David Gernant
Legal Counsel

DG:dj

cc: Mr. Darrell E. Bewley

RECEIVED
JAN [illegible] 1980
Ans'd.....

IN THE COURT OF APPEALS

OF THE STATE OF OREGON

TRUE COPY
ATTORNEY FOR

In the Matter of the Compensation of

SIGNA NELSON,

Appellant,

v.

NO. C/A 14676

STATE ACCIDENT INSURANCE FUND,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

NOTICE is hereby given that SIGNA NELSON, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Oregon Court of Appeals, which reversed the judgment of the Workers' Compensation Board of Oregon, and entered judgment on behalf of Appellee. The judgment of the Court of Appeals may have become final within the meaning of 28 USC 1257 on January 30, 1980.

In the alternative, the judgment of the Court of Appeals may have become final within the meaning of 28 USC 1257 on December 11, 1979.

This appeal is taken pursuant to 28 USC 1257(2).

DATED: February 28, 1980

NOREEN K. SALTVEIT
MERTEN & SALTVEIT
117 S. W. Taylor, Suite C
Portland, Oregon 97204
Tel: 503 227-3157
Attorney for Appellant

Supreme Court, U. S.
FILED
MAY 13 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-6219

SIGNA NELSON, Appellant,

v.

STATE ACCIDENT INSURANCE FUND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF OREGON

MOTION TO DISMISS

DARRELL E. BEWLEY
K.R. MALONEY
JAMES A. BLEVINS
STATE ACCIDENT INSURANCE FUND
SAIF Building
400 High Street S.E.
Salem, Oregon 97312
Telephone: (503) 378-2913

ATTORNEYS FOR APPELLEE

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TABLE OF AUTHORITIES

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Mullane v. Central Hanover Bank and Trust, 339 US 306, 70 S Ct 652, 94 L Ed 865 (1950)	2

STATUTORY PROVISION

Oregon Revised Statute 656.262(6).	2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-6219

SIGNA NELSON, Appellant,

v.

STATE ACCIDENT INSURANCE FUND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF OREGON

MOTION TO DISMISS

Comes now Appellee and moves the Court for an order dismissing the above-entitled appeal on the ground and for the reason that the appeal raises no substantial federal question.

DISCUSSION

Throughout the hearing and appeal process, Appellant has made the following contentions:

1. That notice sent by ordinary mail, as opposed to certified mail, was not adequate notice whether or not received, when sent to Appellant's home address at a time when she was in the hospital.

2. That at the time the notice of denial was sent, Appellee knew that Appellant was incompetent, and therefore notice was insufficient.

NOTICE

ORS 656.262(6) provides:

> "If the State Accident Insurance Fund, the direct responsibility employer itself or its guaranty contract insurer or any other duly authorized agent of such employer for such purpose on record with the Director of the Workers' Compensation Department denies a claim for compensation, written notice of such denial, stating the reason for the denial, and informing the worker of hearing rights under ORS 656.283, shall be given to the claimant. A copy of the notice of denial shall be mailed to the director and to the contributing employer by the fund. The worker may request a hearing on the denial at any time within 60 days after the mailing of the notice of denial."

so that personal service is not required in order to make the notice of denial official.

Nor does the fact that the notice was sent by ordinary mail defeat the notice. The only purpose of certified mail is to provide proof of receipt by the addressee.

Appellant cites a number of cases beginning with Mullane v. Central Hanover Bank and Trust, 339 US 306, 70 S Ct 652, 94 L Ed 865 (1950), which hold that the method of service of notice must be that which is reasonably calculated to apprise the party under all circumstances. However, implicit in those decisions is that no matter what method is used, actual receipt of notice is the highest form of notice. The method used to get the knowledge to the proper party, assuming

the contents of the notice to be as required, is then no longer an issue.

In this case, the evidence is that Appellant resided, i.e., was domiciled, with her daughter. The letter was delivered to Appellant's home. Appellant's daughter opened the letter, decided not to see an attorney about it, and delivered the letter to her mother, the Appellant. No higher form of notice was possible.

APPELLANT'S INCOMPETENCY

Appellant contends that at the time the notice of denial was sent, Appellee knew that she was incompetent to handle her affairs or understand her rights, and therefore the notice was insufficient.

The evidence in this case is that during the period Appellant was undergoing shock treatment she was unable to understand anything and could not therefore handle her affairs.

The evidence also showed that Appellant entered the hospital April 25, 1973. On May 24, 1973, the notice of denial was mailed. The shock treatments began sometime in June 1973, the exact date is not shown in the record.

Appellant's daughter received the notice, opened it, read it and took it to Appellant.

In order to prevail, Appellant must show that she was in fact incompetent at the time of receipt of the notice. In that regard, two things, in addition to the above, are significant.

1. Although one must presume the information was available to Appellant, there is a complete void in the record as to when in June the shock treatments started. It must be presumed that the evidence if produced would not support Appellant.

2. Appellant's daughter testified that during the shock treatments Appellant hardly knew her own daughter and was like talking to a brick wall. She also testified that she took the notice to her mother, but did not remember whether she did this before the shock treatments started. It seems reasonable that she would not have bothered to take it during a time her mother was in the condition described, and therefore she must have taken it before the shock treatments.

This is not a case like Covey v. Town of Somers, 351 US 141 (1956), where the lady upon whom the notice was served was without friends or relatives to help her in her affairs and was commonly known to be incompetent for a period of over fifteen years.

In this case the facts show that Appellant's daughter lived with her and looked after her affairs, as is shown by the fact that the daughter felt it necessary to open the letter and decide whether to see an attorney. Also, in this case it could not have been known in May that because of treatment instituted in June that Appellant would become incompetent.

CONCLUSION

The Appellee sent the notice required by a method which actually placed it in the hands of Appellant and the person handling the affairs of Appellant. There is not a sufficient showing that the Appellant could not understand the notice or that Appellee knew of such circumstances.

Appellee acted reasonably and properly to advise Appellant of her rights. More is not required.

Appellant received actual and adequate notice.

DATED: May 5, 1980

Respectfully submitted,

STATE ACCIDENT INSURANCE FUND

DARRELL E. BEWLEY
of Attorneys for Appellee
SAIF Building
400 High Street S.E.
Salem, Oregon 97312
Telephone: (503) 378-2913

OF COUNSEL:

K.R. MALONEY, Chief Counsel
JAMES A. BLEVINS, Chief Trial Counsel
SAIF Building
400 High Street S.E.
Salem, Oregon 97312
Telephone: (503) 378-2913

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing MOTION TO DISMISS on Noreen K. Saltveit, attorney for Appellant, on the 5th day of May, 1980, by mailing to said attorney three correct copies thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to the said attorney at her regular office address to wit:

Noreen K. Saltveit
Merten & Saltveit
Suite C - Mikado Block
117 S.W. Taylor
Portland, Oregon 97204

and deposited in the post office at Salem, Oregon, on said day. Between the said post office and the address to which said copies were mailed, there is a regular communication by U.S. Mail.

DARRELL E. BEWLEY
STATE ACCIDENT INSURANCE FUND
SAIF Building
400 High Street S.E.
Salem, Oregon 97312
of Attorneys for Appellee

Supreme Court, U. S.
FILED
MAY 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO. 79-6219

SIGNA NELSON, Appellant,

v.

STATE ACCIDENT INSURANCE FUND, Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF OREGON

BRIEF OPPOSING MOTION TO DISMISS

NOREEN K. SALTVEIT
CHARLES J. MERTEN
KAREN L. FINK
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117 S. W. Taylor
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Portland, Oregon 97204
Tel: 503 227-3157

ATTORNEYS FOR APPELLANT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-6219

SIGNA NELSON, Appellant,

v.

STATE ACCIDENT INSURANCE FUND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF OREGON

BRIEF OPPOSING MOTION TO DISMISS

Appellee concedes that Ms. Nelson will prevail if she can show that she was in fact incompetent at the time she allegedly received the denial notice. (Appellee's Motion to Dismiss, p. 3).

Review of the orders of the Workers' Compensation Board by the Oregon Court of Appeals is de novo. ORS 656.298(b). Coday v. Willamette Tug & Barge Co., 250 Or 39, 440 P2d 224 (1968); McManus v. State Accident Insurance Fund, 3 Or App 373, 474 P2d 31 (1970).

The issue before the Court of Appeals was stated by the Court:

> "The issue presented is whether claimant's mental incapacity at the time of the denial excuses her failure to request a hearing on the denial within the time limits established by ORS 656.319(1)." 43 Or App at 157. (emphasis added)

The precise holding of the Court of Appeals was:

> "We hold that claimant's mental incapacity at the time of the denial did not excuse her compliance with ORS 656.319(1)." 43 Or App at 160 (emphasis added)

Thus, the Court of Appeals found as a fact that Ms. Nelson was mentally incapacitated at the time Appellee claims she received notice. Indeed, all the previous fact finders came to the same conclusion. (See Opinion of Workers' Compensation Board, Appendix 9a; Opinion of Referee, Appendix 13a, attached hereto).

Appellee's attempts to find contrary inferences in the record are therefore foreclosed and are red herrings. Further, Appellee's attempt to categorize Ms. Nelson's daughter as a guardian of her mother is unavailing. The daughter testified that she "didn't understand any of it" -- referring to the letter. Secondly, as a matter of due process citizens are entitled to personal notice, unless a legal guardian exists. The daughter was a daughter, not a legal guardian. Here, Appellee had notice of Ms. Nelson's incapacity no later than April 6 -- three weeks before she entered the mental hospital and nine weeks before Appellee sent her notice of denial.

CONCLUSION

Probable jurisdiction should be noted. Indeed, per curiam reversal is warranted.

Dated: May 9, 1980

Respectfully submitted,

MERTEN & SALTVEIT

CHARLES J. MERTEN
of Attorneys for Appellant
117 S. W. Taylor, Suite C
Portland, Oregon 97204
Tel: 503 227-3157

BEFORE THE WORKERS' COMPENSATION BOARD OF

THE STATE OF OREGON

In the Matter of the Compensation of SIGNA NELSON, Claimant [Request for Review by the SAIF]	WCB Case No. 77-1153 SAIF Claim No. DC 434390 ORDER ON REVIEW

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks review by the Board of the Referee's order setting aside its denial dated May 24, 1974 of claimant's psychological problems and remanding the claim to the Fund for acceptance and payment of compensation, as provided by law.

At the hearing before the Referee, four issues were presented: (1) extent of disability; (2) propriety of the Fund's denial of responsibility for claimant's psychological problems; (3) propriety of the Fund's refusal to reopen the claim as of March 10, 1977; and (4) whether or not claimant was presently orthopedically and psychologically stationary.

Claimant had suffered a compensable injury to her back in December 1972 and was receiving compensation for that injury at the time she was admitted to the Oregon State Hospital as a patient on April 25, 1973. Claimant remained as a patient there until September 11, 1973 when she was discharged and considered improved, competent, and able to drive a motor vehicle. Claimant's illness was diagnosed as involutional melancholia, in remission. She had been tried on various psychotrophic medications since her admission, but when she failed to respond she was given a course in electroconvulsive therapy in June 1973 to alleviate the depression; this was only moderately successful.

Upon claimant's discharge, it was recommended that she contact the Multnomah County Mental Health Clinic for a follow-up and further prescriptions. The prognosis was fair if in the near future she could get a meaningful full time job, but the doctor indicated that if this did not happen it was quite possible claimant would become depressed again and might require rehospitalization.

Claimant's claim was first closed by a Determination Order in July 1973 which awarded her 16° for 5% permanent partial disability. On December 27, 1973 the claim was reopened for treatment and on February 15, 1974 a laminectomy was performed at L4-5.

Claimant was referred to the Pain Clinic in Portland on June 5, 1974 and her claim was subsequently closed by a Second Determination Order dated June 23, 1974 which awarded claimant additional compensation for 20% permanent partial disability but nothing for the psychological problems which had been denied on May 24, 1973.

Claimant requested a hearing on November 19, 1974 and raised all of the issues referred to previously. Pursuant to a stipulation, dated April 29, 1975, the claim was reopened. A Third Determination Order, dated July 21, 1975, awarded claimant no additional compensation for permanent partial disability. Again a request for hearing was made and again the claim was reopened for further treatment prior to the hearing. The claim was then closed by a Fourth Determination Order, dated February 1, 1977, which awarded claimant additional compensation for temporary total disability and additional 32° for 10% permanent partial disability.

On February 7, 1977 another request for hearing was made and on June 10, 1977 all parties were present for that hearing which was actually treated as a conference and the issue of the competency of claimant at the time she received the letter denying responsibility for her psychological problems was delineated. On August 15, 1977 there was a request for reopening and another request for hearing.

The Fund's position was that the Referee had no jurisdiction to entertain the motion to set aside the denial because at some time the denial was brought to her attorney and she thereafter became competent so that she was now bound thereby.

Dr. Moss, a psychiatrist, testified that claimant's industrial trauma when she fell down some stairs was a significant triggering effect in precipitating claimant's depression and that she had never re-established herself to the psychological state which she had been prior to the industrial injury.

Dr. Moss interviewed claimant to determine if she understood the denial made by the Fund. He read the hospital records relating to the electrical shock treatment to establish the proximity of time to the date she received the denial letter and he also checked her memory and comprehension at that time. He felt she had some knowledge of the denial matter but that her memory changed from day to day and she could not keep it in focus.

It was Dr. Moss' opinion that claimant's memory confusion probably cleared somewhat after September, however, it was not a complete recovery. Claimant told Dr. Moss she continued to have back problems which affected her emotionally and from 1973 to 1976 she had been receiving out-patient mental clinic care. Dr. Moss, who had previously worked at the Oregon State Hospital, said it was standard procedure no matter what condition the patient was in to report that he or she was considered improved, competent, and able to drive a motor vehicle at the time said patient was discharged.

The Referee found that claimant did not have the competency to understand the letter of denial to the extent that she would have been able to make a timely request for hearing when she received the letter while a patient in the Oregon State Hospital. Although several months later she was able to perform day to day tasks, she still did not have the emotional and mental level to request a hearing on the issue until it was actually done on her behalf by an attorney. He found that all the medical evidence indicated that claimant still has not returned to her pre-accident mental status and that she has had on-going mental problems and has a serious problem even at the present time. He set aside the denial by the Fund for responsibility for claimant's psychological problems dated May 24, 1973. This rendered moot all of the other issues.

The Board, on de novo review, finds that Dr. Moss' testimony is sufficient to establish that claimant's psychological problems were related to her industrial injury in December 1972 and, therefore, the denial of responsibility therefor by the Fund was improper. The Board agrees with the Referee that claimant was not mentally competent at the time she received the Fund's denial dated May 24, 1973 to fully realize what was required to make a timely request for hearing on said denial. The Referee properly set aside the denial and by doing so rendered moot all of the other issues presented at the hearing.

ORDER

The order of the Referee, dated June 21, 1978, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum of $350, payable by the State Accident Insurance Fund.

NOTICE TO ALL PARTIES: This order is final unless within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

Entered at Salem, Oregon and copies mailed to:

Signa Nelson, 1509 Jackson St., Oregon City, OR 97045
Merten & Saltveit, Attorneys, 117 SW Taylor St., Portland, OR 97204
City Center Motel, 250 First Ave., Seaside, OR 97128
State Accident Insurance Fund, Claims Div., Salem, OR 97312
SAIF, Legal Services, 400 SE High, Salem, OR 97312

on this 15th day of May, 1979

WORKERS' COMPENSATION BOARD

M. Keith Wilson, Chairman

Approved as to form:

John R. McCullough
Appeals Counsel

Kenneth V. Phillips, Board Member

BEFORE THE WORKERS' COMPENSATION BOARD

STATE OF OREGON

HEARINGS DIVISION

In the Matter of the Compensation of SIGNA NELSON, Claimant	)	WCB Case No. 77-1153 SAIF Claim No. DC 434390 OPINION AND ORDER

This matter came on regularly for hearing the 25th day January, 1978, in Portland, before Joseph D. St. Martin, Administrative Law Judge. Claimant was present and represented by Peter Davis and the State Accident Insurance Fund appeared by and through Ken Kleinsmith. The case was continued for closing arguments and claimant's brief was received March 31, 1978. SAIF's counsel telephoned the undersigned that SAIF would not submit a closing argument, but the telephone message was inadvertently mislaid, and the case was closed April 26, 1978 upon request of claimant's counsel.

The prime issue is whether SAIF's denial of May 24, 1973 should be set aside. The denial was for responsibility for psychological problems and was sent to her last known home address. During the interim, claimant was admitted on April 25, 1973 to the Oregon State Hospital where she was a patient until September 11, 1973. She was discharged as considered improved, competent and able to drive a motor vehicle. The diagnosis was involutional melancholia, in remission. She was receiving compensation from her December, 1972 industrial accident to her back while she was in the hospital. Claimant was tried on various psychotrophic medications since April, 1973, but when she failed to respond she was given a course of electroconvulsive therapy in June, 1973 to alleviate the depression which was only moderately successful. She continued to be on an anti-depressant medication and on discharge it was recommended that she contact the Multnomah County Mental Health Clinic for follow-up and further prescriptions. Prognosis was fair if in the near future she could get a meaningful full-time job. The doctor indicated that if this did not happen there was a good chance that claimant would become depressed again and might need to be rehospitalized. Prognosis from that standpoint remained somewhat guarded. The doctor's prognosis was very acurate because she has had to be rehospitalized.

In July of 1973, a First Determination Order was issued awarding 5% permanent partial disability. On December 27, 1973, the claim was re-opened for treatment and on February 15, 1974 a laminectomy was performed at L4-5. On June 5, 1974, she was referred to the Portland Pain Clinic. A Second Determination Order of June 23, 1974 awarded claimant an additional 20% permanent partial disability and nothing for the denied condition. Claimant first requested a hearing on November 19, 1974, raising all issues. On April 29, 1975, a Stipulation was entered into re-opening her claim and on July 21, 1975 a Third Determination Order was issued awarding no additional permanent partial disability. There was a request for hearing and then on January 1, 1976 the claim was again re-opened for further treatment. On February 1, 1977, a Fourth Determination Order awarded additional time loss and an additional 10% permanent partial disability. On February 7, 1977, there was a request for hearing and on June 10, 1977 all parties were present for a hearing that was treated as a conference and the issue of the competency of claimant when she received the denial letter for psychological problems was delineated. On August 15, 1977, there was a request for re-opening and another request for hearing.

The Fund's position is that the Administrative Law Judge has no jurisdiction to entertain the Motion to set aside the denial because at some time the denial was brought to her attorney and she thereafter became competent so that she was now bound thereby.

At the hearing, a well qualified psychiatrist, Dr. Roy Moss, testified that her industrial trauma when she fell down some stairs was the significant triggering effect in precipitating her depression and that she has never re-established herself to the psychological state she had before the industrial accident.

Dr. Moss testified that he interviewed claimant a second time to ascertain if she understood the SAIF denial. He read the hospital records of the dates of the electroshock treatment to establish the proximity of time to receiving the denial and he prepared himself for checking her memory and comprehension at that time. He thought she had some knowledge of the denial matter, but her memory changed from day to day and she could not keep it in focus. He thought that her memory confusion probably cleared in 2-3 months and that perhaps after September over a period of 2-5 months she became more clear in her mind, but it was not a complete recovery. By history she continued to have back problems which affected her emotionally and from 1973 to 1976 she had out-patient mental clinic care. She told the doctor in October of 1973 she could handle everyday things, but he thought that she was passive,

that even though she understood the matter that she would be a person most reluctant to take steps on her own. Her passivity and depression may have made her feel hopeless to pursue any denial matter. She thought the denial matter was foreclosed to her and that's why she never tried to relitigate it.

On cross-examination, Dr. Moss testified that she had a passive-dependent personality before the accident, but she compensated for it and was able to function. He stated that he used to work at the State hospital and it was standard to say no matter what state the patient was in, that he or she is now considered improved, competent and able to drive a motor vehicle. On redirect, he stated claimant was significantly impaired irrespective of money factors involved in the compensation claim.

OPINION:

I am of the opinion that claimant did not have the competency to understand the denial to timely request a hearing when she received it while in the State mental hospital and that while several months later she was able to perform day to day tasks she did not have the emotional and mental level to request a hearing on the issue thereafter until it was done on her behalf by counsel. All of the medical testimony, and there is none to the contrary, points out that she still has not returned to her pre-accident mental status and that she has had ongoing mental problems and has a serious problem even yet today. Her mental condition for this entire period of time has been very carefully reviewed by Dr. Moss and I am well satisfied with his honest, credible testimony about claimant's mental health condition. The setting aside of this denial renders the other issues moot.

ORDER:

IT IS HEREBY ORDERED that the SAIF denial of May 24, 1973 be and the same is hereby set aside; and

IT IS FURTHER ORDERED that the claim for psychological problems precipitated by the industrial accident be and the same is hereby remanded to SAIF for acceptance and payment of benefits as by law provided; and

IT IS FURTHER ORDERED that Peter Davis be and he is hereby awarded a reasonable attorney fee of $1,000 for prevailing upon a denied claim payable by SAIF.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing BRIEF OPPOSING MOTION TO DISMISS on Darrell E. Bewley, attorney for Appellee, on the 9th day of May, 1980, by mailing to said attorney three correct copies thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to the said attorney at his regular office address, to wit:

Darrell E. Bewley
State Accident Insurance Fund
SAIF Building
400 High Street, S. E.
Salem, Oregon 97312

and deposited in the post office at Portland, Oregon, on said day. Between the said post office and the address to which said copies were mailed, there is a regular communication by U. S. Mail.

CHARLES J. MERTEN
MERTEN & SALTVEIT
117 S. W. Taylor, Suite C
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of Attorneys for Appellant

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